Order Code RL31604

Suits Against State Employers Under the Family and Medical Leave Act: Analysis of *Nevada Department of Human Resources v. Hibbs*

Updated May 26, 2004

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Summary

This report discusses *Nevada Department of Human Resources v. Hibbs*, a recent case in which the Supreme Court held that states may be sued by private individuals under the Family and Medical Leave Act (FMLA). This report provides an overview of the Supreme Court's decision, coupled with a discussion of its significance for state immunity from private lawsuits under other federal statutes.

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I. Introduction

This report discusses *Nevada Department of Human Resources v. Hibbs*,[1] a recent case in which the Supreme Court held that states may be sued by private individuals under the Family and Medical Leave Act (FMLA). This report provides an overview of the Supreme Court's decision, coupled with a discussion of its significance for state immunity from private lawsuits under other federal statutes.

Overview of the Family and Medical Leave Act

Enacted in 1993, the Family and Medical Leave Act (FMLA)[2] was designed to aid workers who face the competing demands of the workplace and the family. According to the act's findings, employees who are ill or who are caring for a child or a sick relative are often forced to choose between their job security and family responsibilities.[3] Congress also found that such caretaking demands typically constitute a disproportionate burden on women, who have historically been constrained by stereotypical assumptions about gender roles.[4] Concerned that any leave policy that favored women over men would perpetuate gender stereotypes, as well as cause employers to discriminate against women in hiring, Congress enacted the gender-neutral FMLA.

According to Congress, the purposes of the FMLA are to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to allow workers to take reasonable leave to handle family or medical needs.[5] Emphasizing that these goals should be met in a manner that is consistent with the Equal Protection Clause of the Fourteenth Amendment, Congress sought to reduce the potential for employment discrimination on the basis of sex and

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[1] 538 U.S. 721 (2003).

[2] 29 U.S.C. § 2601 et al.

[3] *Id*. at § 2601(a)(3).

[4] *Id*. at § 2601(a)(5).

[5] *Id*. at § 2601(b).

to promote the goal of equal employment opportunity for men and women by enacting a policy that grants leave to all eligible employees, regardless of gender.[6]

Under the FMLA, employees may take up to 12 weeks of unpaid leave under three specific circumstances. These circumstances include (1) leave taken due to the employee's own serious health condition, (2) leave taken to care for the employee's relative with a serious health condition, or (3) leave taken to care for an employee's new child, including a child placed with the employee through adoption or foster care.[7] In order to enforce these leave provisions, the act authorizes employees to sue for damages, equitable relief, and attorney's fees if their rights have been violated.[8] Likewise, the federal government may sue employers on behalf of individual employees for damages and injunctive relief.[9]

Case History

In *Nevada Department of Human Resources v. Hibbs,*[10] a state employee was fired for allegedly exceeding his 12 weeks of FMLA leave to care for his ill wife. Contending that his FMLA leave should run subsequent to, not concurrent with, the paid leave he had already taken, the employee sued the Nevada Department of Human Resources for misapplying the FMLA. Ruling for the state, the district court dismissed the lawsuit on the grounds that the employee could not sue the agency because Nevada is immune from private lawsuits under the Eleventh Amendment. The Court of Appeals for the Ninth Circuit, however, reversed the district court's decision.[11] Shortly thereafter, the Supreme Court granted certiorari,[12] and the Court ultimately upheld the Ninth Circuit's ruling that the FMLA was enacted pursuant to a valid exercise of Congress' § 5 enforcement power and therefore did indeed constitute a legitimate abrogation of state immunity from private suits.[13]

Notably, the *Hibbs* decision came in the wake of two similar sovereign immunity cases that the Court had ruled on previously. In *Kimel v. Florida Board of Regents* and in *Board of Trustees of University of Alabama v. Garrett*, the Supreme Court held that federal statutes that target, respectively, age and disability discrimination do not validly abrogate state sovereign immunity because they do not constitute appropriate enforcement legislation.[14] Thus, the *Hibbs* case represents a reversal of a recent trend

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[6] *Id*. at §2601(b)(4)-(b)(5).

[7] *Id*. at § 2612(a)(1).

[8] *Id*. at §2617(a)(1)-(3).

[9] *Id*. at §§2617(b)(2)-(3), (d).

[10] 538 U.S. 721 (2003).

[11] 273 F.3d 844 (9th Cir. 2001), *cert. granted*, 536 U.S. 938 (2002).

[12] 536 U.S. 938 (2002).

[13] *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 740 (2003).

[14] *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83-89 (2000); *Bd. of Trustees of the Univ. v. Garrett*, 531 U.S. 356, 366-67 (2001). For a discussion of *Kimel*, see CRS Report RL30364,

(continued...)

in which the Court has generally ruled in favor of states rights in cases involving congressional abrogation of state sovereign immunity.[15]

II. The Legal Background

As noted above, the *Hibbs* case raised several important legal issues that stem from two different constitutional amendments, namely the Eleventh Amendment and the Fourteenth Amendment. Each of these amendments, as well as the Supreme Court's interpretation of them, is described in this section.

The Eleventh Amendment and Sovereign Immunity

The Supreme Court has long interpreted the Eleventh Amendment as protecting states from private suits brought in federal court.[16] Under this doctrine of sovereign immunity, however, a state is not immune from such suits if the state voluntarily and expressly waives such immunity or if the federal government validly abrogates the Eleventh Amendment. In order to validly abrogate state sovereign immunity, Congress must both (1) unequivocally express its intent to abrogate that immunity and (2) act pursuant to a valid exercise of power.[17]

Although the first part of the above test for congressional abrogation of immunity is easily satisfied if Congress uses "unmistakably clear" language to convey its intent to abrogate,[18] the second part of the test involves more complicated analysis. Under this test, Congress may act pursuant to a valid exercise of power by means of its enforcement power under § 5 of the Fourteenth Amendment.[19] Indeed, ever since the Court's decision in *Seminole Tribe v. Florida* eliminated congressional authority to

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[14] (...continued)
Legal Issues Affecting the Right of State Employees to Bring Suit Under the Age Discrimination in Employment Act and Other Federal Labor Laws. For a discussion of *Garrett*, see CRS Report RS20828, *University of Alabama v. Garrett: Federalism Limits on the Americans with Disabilities Act*. For a general discussion of sovereignty immunity and federalism issues, see CRS Report RL30315, *Federalism, State Sovereignty and the Constitution: Basis and Limits of Congressional Power*.

[15] Indeed, the Court, in a case involving a different provision of the statute involved in *Garrett*, recently held that a disabled individual could, under certain circumstances, sue the state for discrimination in its public services, programs, and activities. This decision, however, was limited to cases involving violations of fundamental rights, such as access to the courts. *Tennessee v. Lane*, No. 02-1667, 2004 U.S. LEXIS 3386 (May 17, 2004).

[16] *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890).

[17] *Seminole Tribe*, 517 U.S. at 55.

[18] *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985).

[19] *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

abrogate state sovereign immunity pursuant to its Commerce Clause power,[20] the Fourteenth Amendment remains one of the few judicially approved mechanisms by which Congress can enact statutes that permit private citizens to enforce federal legislation by suing a state.

The Fourteenth Amendment and the Section 5 Enforcement Power

As noted above, in order to determine whether a statute has been enacted pursuant to a valid act of power, a court must begin by examining the scope of Congress' enforcement power under the Fourteenth Amendment.[21] The Supreme Court has long recognized the sweeping powers guaranteed to Congress under § 5 of the Fourteenth Amendment:[22]

> Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress' power to enforce the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.[23]

In *City of Boerne v. Flores*, the Supreme Court described the limits of this enforcement power by noting that Congress cannot "decree the substance of the Fourteenth Amendment's restrictions on the States."[24] According to the Court, Congress may enforce the Fourteenth Amendment by enacting legislation that remedies or prevents a constitutional violation, but only the judicial branch may "determine what constitutes a constitutional violation."[25] Thus, Congress can enact legislation that prohibits state conduct that violates the Fourteenth Amendment, just as it can enact broader remedial legislation, but it may not enact substantive legislation that defines the scope of the constitutional requirements on states.

In order to distinguish between what constitutes appropriate remedial legislation and what constitutes forbidden substantive legislation, the *Boerne* Court held that when Congress enacts remedial legislation, "there must be a congruence and proportionality

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[20] 517 U.S. 44 (1996).

[21] Section 1 of the Fourteenth Amendment states in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Section 5 of the Fourteenth Amendment states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

[22] *See, e.g., Katzenbach v. Morgan*, 384 U.S. 641 (1966).

[23] *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000)

[24] *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

[25] *Id.* at 519.

between the injury to be prevented or remedied and the means adopted to that end."[26] As the appeals court noted in *Hibbs*, "[t]he congruence and proportionality inquiry requires a reviewing court (1) to identify with some precision the scope of the constitutional right at issue, and (2) to determine whether the statute in question is an appropriate remedy for violations of that right."[27]

III. Supreme Court Review

The Supreme Court granted certiorari in *Hibbs* in order to review whether the family medical leave provision of the FMLA is a valid exercise of the § 5 enforcement power that abrogates state immunity. As noted above, the Court ultimately upheld the family medical leave provision in a 6-3 decision, ruling that individuals may sue states in federal court for violations of the statute.

The Eleventh Amendment and Sovereign Immunity

As noted above, a threshold question in a sovereign immunity case is whether Congress has unequivocally expressed its intent to abrogate the Eleventh Amendment. In *Kimel*, a recent sovereign immunity case, the Supreme Court held that an enforcement provision in the Age Discrimination in Employment Act, which is identical to the enforcement provision in the FMLA, was a clear expression of congressional intent to abrogate state sovereign immunity.[28] In *Hibbs*, therefore, the Court quickly determined that Congress had satisfied the clear statement rule, thus meeting the first part of the two-part test to determine whether or not the federal government has validly abrogated state sovereign immunity.[29] However, in order to determine whether the FMLA was enacted pursuant to a valid act of power - the second prong of the two-part test - the Court was compelled to engage in a detailed analysis of whether or not Congress had legitimately exercised its enforcement authority under § 5 of the Fourteenth Amendment.

The Fourteenth Amendment and the Section 5 Enforcement Power

In order to determine whether the family leave provision of the FMLA was enacted pursuant to a valid exercise of power, the *Hibbs* Court used the two-part congruence and proportionality test to (1) identify the constitutional violation that the statute in question is designed to prevent, and (2) to determine whether the legislative record identifies actual constitutional violations that justify a broad statutory remedy. Applying the first part of the congruence and proportionality test, the Court found that the constitutional right at issue in the FMLA was the equal protection of the sexes since

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[26] *Id.* at 520.

[27] *Hibbs v. Nev. Dep't of Human Res.*, 273 F.3d 844, 853 (9th Cir. 2001), *cert. granted*, 536 U.S. 938 (2002).

[28] 528 U.S. 62, 73-78 (2000).

[29] *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003).

the statute "aims to protect the right to be free from gender-based discrimination in the workplace."[30]

Under the second element of the test, the Court's next inquiry was to determine whether the family leave provision of the FMLA constitutes an appropriate remedy for sex discrimination. The Court began its task by evaluating whether Congress had found sufficient evidence of unconstitutional employment discrimination by the states. Noting that the Court's own decisions reveal a long history of state laws that discriminate against women in employment, the majority in *Hibbs* found that Congress had originally attempted to remedy such discrimination by enacting Title VII of the Civil Rights Act of 1964, which abrogated state sovereign immunity with regard to employment discrimination on the basis of sex.[31] Despite the passage of Title VII, Congress later found evidence that states had continued "to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits,"[32] thus prompting legislators to enact the FMLA. For example, the legislative record behind the FMLA reveals evidence that many states granted lengthy maternity leave but did not offer parallel paternity leave, thereby reflecting stereotypical notions of caretaking roles, and that some states with discretionary leave policies applied such policies in a discriminatory fashion.[33] Because the majority in *Hibbs* found that Congress could reasonably conclude that such evidence reflected a persistent pattern of unconstitutional employment discrimination by the states, the Court held that Congress was justified in enacting the FMLA as appropriate remedial legislation under its § 5 enforcement power.[34]

The majority distinguished the result in *Hibbs* from the outcome in two other recent Supreme Court cases – *Kimel* and *Garrett* – that involved state sovereign immunity from suits under federal anti-discrimination statutes.[35] According to the Court's analysis, because age and disability discrimination are subject to rational basis review under the Court's equal protection doctrine, states may constitutionally differentiate between nonsuspect classes like age and disability if they demonstrate a rational reason for doing so, thus making it more difficult for Congress to demonstrate a pattern of unconstitutional state behavior that warrants remedial federal legislation under its § 5 enforcement power. Sex discrimination, however, receives heightened scrutiny, which requires states and other governmental actors to prove that gender classifications are substantially related to an important governmental interest. Since it is more difficult for gender-based classifications to pass constitutional muster, it is

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[30] *Id.* at 728.

[31] *Id.* at 729-30.

[32] *Id.* at 730.

[33] *Id.* at 730-35.

[34] *Id.* at 734.

[35] In spite of the *Garrett* ruling, the Court's recent decision in *Tennessee v. Lane* allowed a disabled individual to sue the state for discrimination in its public services, programs, and activities. The *Lane* decision, however, was limited to cases involving violations of fundamental rights, such as access to the courts. *Tennessee v. Lane*, No. 02-1667, 2004 U.S. LEXIS 3386 (May 17, 2004).

easier for Congress to establish a pattern of unconstitutional discrimination when suspect classifications like sex are involved.[36]

In addition, the *Hibbs* Court declared that the scope of the FMLA was narrowly targeted to the violation at issue because, for example, the statute requires unpaid leave only and covers only certain employees and employers.[37] Thus, the majority concluded:

> We believe that Congress' chosen remedy, the family-care leave provision of the FMLA, is 'congruent and proportional to the targeted violation.' . . . By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.[38]

The Dissent

Although the majority opinion in *Hibbs* garnered the support of six Justices, the remaining three Justices joined in a spirited dissent that criticized the majority opinion on several grounds[39]. First, the dissent criticized the proffered evidence of state employment discrimination, arguing that both Congress and the Court had supplied evidence of discrimination by private employers but had failed to demonstrate an actual pattern of unconstitutional behavior on the part of the states.[40] Indeed, the dissent specifically noted that several states had already tackled the employment discrimination issue by enacting gender-neutral leave policies before Congress passed the FMLA.[41] Another criticism leveled by the dissent was that the FMLA did not represent appropriate remedial legislation but rather constituted a "substantive entitlement program" imposed on the state.[42] Under this view, the dissent argued that the FMLA is a benefit program designed to provide twelve weeks of leave and not a remedial statute that requires states to provide leave on an equal basis.[43] Drawing on these arguments, the dissent contended that the FMLA was not congruent and proportional

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[36] *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 735-37 (2003).

[37] *Id.* at 738-40.

[38] *Id.* at 737.

[39] The dissenting Justices included Justice Kennedy, Justice Scalia, and Justice Thomas.

[40] *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 745-54 (2003).

[41] *Id.* at 750.

[42] *Id.* at 754.

[43] *Id.* at 754-55.

remedial legislation and thus was "not a valid abrogation of state sovereign immunity."[44]

IV. Conclusion

The Supreme Court held in *Hibbs* that the family leave provision of the FMLA was enacted pursuant to a valid exercise of Congress' § 5 enforcement power and, therefore, did indeed constitute a legitimate abrogation of state immunity from private suits. In doing so, the Court appears to be drawing in the sovereign immunity context the same line between statutes that protect suspect and nonsuspect classifications as it has drawn in its Equal Protection doctrine. Although the *Hibbs* decision represents a departure from other federalism cases that have preserved state immunity despite congressional attempts to override such immunity, the case does not necessarily represent an end to the trend in favor of states' rights. Indeed, state suit provisions under other federal statutes remain under legal attack in the federal courts, and the two remaining leave provisions in the FMLA may also face constitutional challenges. It is important to note, however, that even if the Court finds other state suit provisions to be unconstitutional, state employees whose statutory rights have been violated still have remedies available to them. The potential consequences for state suit provisions under other federal laws, as well as available alternative remedies, are discussed below.

Consequences for Other Federal Laws

Although the Supreme Court affirmed the constitutionality of the family leave provision at issue in *Hibbs*, the remaining two leave provisions in the FMLA may be affected by the Court's ruling. Furthermore, the *Hibbs* decision also affects state suit provisions authorized under other federal statutes aimed at preventing discrimination. Some of the likely implications are discussed briefly below.

Remaining FMLA Provisions. Individual suits against state employers under both the family childcare provision and the personal sick leave provision of the FMLA are likely to be affected by the Supreme Court's decision in *Hibbs*. Since *Hibbs* upheld the family leave provision, private suits against states under the family childcare provision are also likely to be upheld against any future Eleventh Amendment challenges. Like family medical leave, childcare leave would be defended on the grounds that it is intended to combat gender discrimination and therefore constitutes appropriate § 5 enforcement legislation capable of abrogating state immunity.

Unlike family medical leave, however, the personal sick leave provision of the FMLA cannot be justified as protecting against gender discrimination. Rather, the personal sick leave provision has traditionally been defended on the grounds that it protects against discrimination based on temporary disability. However, in the wake of the Supreme Court's decision in *Garrett* and in spite of the recent *Tennessee v. Lane* case, it appears highly unlikely that the Court would uphold legislation based on disability discrimination as valid § 5 legislation. Indeed, at least nine of the federal Courts of Appeals to consider the issue have held that state immunity is not validly

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[44] *Id.* at 759.

abrogated under the personal sick leave provision,[45] and the Supreme Court is likely to agree. Indeed, the government has already conceded as much, announcing that it is "abandoning further constitutional defense of the abrogation of Eleventh Amendment immunity for the individual sick leave provision."[46]

Other Federal Laws. As with the remaining FMLA provisions, the Supreme Court's decision in *Hibbs* is likely to affect other federal statutes that contain state suit provisions. Given that the Court in *Hibbs* upheld the family leave provision as valid § 5 enforcement legislation in part because it was intended to combat discrimination against a suspect class, state suit provisions authorized under other federal statutes aimed at preventing discrimination against suspect classes would likely be upheld as well. For example, prior to the *Hibbs* decision, statutory provisions authorizing private race or gender discrimination claims under Titles VI or VII of the Civil Rights Act or private suits under the Equal Pay Act (EPA) or Title IX of the Education Amendments of 1972 had come under legal challenge. Despite the result in *Hibbs*, however, disparate impact discrimination claims brought under these statutes remain susceptible to attack. Because the Constitution prohibits disparate treatment only, private disparate impact claims may be perceived of as exceeding the scope of § 5 in a manner that lacks the requisite congruence and proportionality. The federal courts have begun to hear sovereign immunity challenges to private suits brought under these statutes, with mixed results.[47] However, a detailed analysis of these cases is beyond the scope of this report.

Alternative Remedies

Regardless of which way the Supreme Court has ruled in past cases or will rule in future cases involving sovereign immunity challenges to statutory provisions authorizing suits against the states, individuals whose statutory rights have been violated will continue to have recourse to alternatives beyond suing their state employers for money damages. Indeed, even if the Supreme Court were to rule that Congress did not validly abrogate the Eleventh Amendment when it enacted a given

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[45] *See, e.g., Brockman v. Wyo. Dep't of Family Servs,*342 F. 3d 1159, 1165 (10th Cir. 2003); *Laro v. New Hampshire*, 259 F.3d 1, 11 (1st Cir. 2001); *Lizzi v. Alexander*, 255 F.3d 128, 136 (4th Cir. 2001);*Townsel v. Missouri*, 233 F.3d 1094, 1095 (8th Cir. 2000); *Chittister v. Dep't of Cmty. & Econ. Dev.*, 226 F.3d 223, 229 (3d Cir. 2000); *Kazmier v. Widmann*, 225 F.3d 519, 529 (5th Cir. 2000); *Sims v. Univ. of Cincinnati*, 219 F.3d 559, 566 (6th Cir. 2000); *Hale v. Mann*, 219 F.3d 61, 69 (2d Cir. 2000); *Garrett v. Univ. of Ala. at Birmingham Bd. of Trustees*, 193 F.3d 1214, 1220 (11th Cir. 1999), *rev'd on other grounds*, 531 U.S. 356 (2001).

[46] Brief for the United States in Opposition at 8, *Hibbs v. Department of Human Resources*, 273 F.3d 844 (9th Cir. 2001) (No. 01-1368).

[47] *See, e.g., Nanda v. Univ. of Illinois*, No. 01-3448, 2002 WL 31056992, at *1 (7th Cir. 2002) (Title VII); *Okruhlik v. Univ. of Arkansas*, 255 F.3d 615 (8th Cir. 2001) (Title VII); *Varner v. Ill. State Univ.*, 226 F.3d 927 (7th Cir.2000) (EPA); *Kovacevich v. Kent State Univ.*, 224 F.3d 806 (6th Cir.2000) (EPA); *Hundertmark v. Fla. Dep't of Transp.*, 205 F.3d 1272 (11th Cir.2000) (EPA); *In re: Employment Discrimination Litig. Against the State of Ala.*, 198 F.3d 1305 (11th Cir. 1999) (Title VII); *O'Sullivan v. Minnesota*, 150 F.3d 431 (5th Cir.1998) (EPA); *Franks v. Ky. Sch. for the Deaf*, 142 F.3d 360 (6th Cir.1998) (Title IX); *Crawford v. Davis*, 109 F.3d 1281 (8th Cir.1997) (Title IX).

statute that authorized suits against the states, state immunity from suit would not necessarily be absolute.

For example, under the FMLA, the federal government is authorized to bring suits against states in federal court on behalf of individual plaintiffs,[48] and such authority is typically available under other federal statutes that create rights of action against state employers. Furthermore, despite state immunity from suits seeking money damages, under the doctrine of *Ex parte Young*, federal courts have limited jurisdiction over suits for prospective injunctive relief filed against state officials acting in their official capacities.[49] Thus, a state employee may be able to sue his supervisors for injunctive relief even if his suit against the state agency is blocked by the Eleventh Amendment.

Another enforcement alternative is available when statutes that provide federal funding impose the requirement that states waive their immunity from private suit in exchange for federal funds.[50] Although the FMLA is not such a statute, conditioning waiver upon receipt of federal funds is one way in which Congress may secure an individual's right to sue under other anti-discrimination legislation.[51] Finally, states may voluntarily waive immunity by passing legislation that permits enforcement of state leave laws in state court.[52]

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[48] 29 U.S.C. §2617(b).

[49] *Ex parte Young*, 209 U.S. 123 (1908).

[50] Christina Bohannan, "Beyond Abrogation of State Immunity: State Waivers, Private Contracts, and Federal Incentives," 77 NYULR 273, 303-44 (2002).

[51] In fact, Congress expressly enacted 42 U.S.C. § 2000d-7, which provides that states shall not be immune from suit in federal court for violations of any federal anti-discrimination statute. In *Koslow v. Pennsylvania*, 302 F.3d 161 (3d Cir. 2002), the court upheld 42 U.S.C. § 2000d-7, ruling that state acceptance of federal funds constituted a valid waiver of immunity under § 504 of the Rehabilitation Act.

[52] Brief for Petitioner at 20, *Hibbs v. Department of Human Resources*, 273 F.3d 844 (9th Cir. 2001) (No. 01-1368).